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NO. 80-1765

IN THE SUPREME COURT
OF THE UNITED STATES

October, 1980

THE AMERICAN SOCIETY
OF MECHANICAL ENGINEERS, INC.,
a New York corporation,

Petitioner,

vs.

HYDROLEVEL CORPORATION,
a New York corporation,

Respondent.

AMICUS CURIAE BRIEF OF THE NATIONAL COUNCIL OF ENGINEERING EXAMINERS IN SUPPORT OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

A) Amicus Curiae Brief of The National Council of Engineering Examiners-------- 1

1) Statement of Interest of Amicus Curiae---------- 1

2) Reasons for Granting The Writ---------- 6

B) Conclusion---------- 14

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Council of Engineering Examiners has obtained the consent of Hydrolevel Corporation and The American Society of Mechanical Engineers, Inc. to file a Brief Amicus Curiae in Support of The American Society of Mechanical Engineers, Inc. Petition for a Writ of Certiorari. It is in the best interest of The National Council of Engineering Examiners, hereinafter referred to as The Council, that the lower court opinion be reviewed because of the fact that The Council's existence is gravely threatened by the opinion of the lower court.

The Council is a nonprofit organization organized in 1920 with its major purpose being to serve as an organization through which its member

state and jurisdictional boards can counsel and act together to better discharge their duties as individual autonomous regulatory agencies dedicated to the protection of the public life, health, and property. Full support is derived primarily from public funds consisting of examination fees. This Council consists of fifty state boards and four jurisdictional boards, (Puerto Rico, Guam, District of Columbia and the Virgin Islands) and thereby encompasses approximately 400,000 licensed professional engineers in various disciplines throughout the United States. The Council, an umbrella organization which is composed entirely of state and jurisdictional boards, interfaces with several other umbrella-type organizations of engineering societies,

such as ASEE, (American Society for Engineering Education) and ABET (Accreditation Board for Engineering and Technology), as well as with all of the major engineering societies which represent the various disciplines of engineering.

One of the primary purposes of this organization is the preparation of a semi-annual examination given as part of the process to qualify engineers as licensed professional engineers. Each year over 50,000 persons participate in this examination process through the above-mentioned state boards and jurisdictional boards. The staff which The Council has available to meet this primary purpose and the other purposes mentioned above consists of approximately 20 paid persons and another approxima-

ely 300 licensed professional engineers who receive for services performed during the two examination periods nominal compensation each year. The remaining contributions made to complete the purpose and goal of The Council are provided by individual licensed professional engineers throughout the country, who may or may not be individual members of the state and jurisdictional boards, who volunteer their time and talents to the organization freely and voluntarily and without compensation. It is estimated that each year several hundred thousand volunteer hours are expended by various licensed professional engineers on behalf of The Council. Almost totally through the efforts of these volunteers, there has been a uniformity in the examinations

given to qualify engineers as licensed professional engineers. Prior to the establishment of The Council, each state had its own separate examination committee to prepare the questions and answers and, as a result, the examination process was subject to immense local input and control. Through the creation of The Council, consistent, uniform, and objective standards for the licensing of professional engineers have been promulgated for the public benefit.

Along with its contributions to the standardization of licensing examinations, The Council has also worked to provide state and jurisdictional boards with uniformity in drafting a model law to better serve the public interests. Consequently, the public has been better served by

the creation of uniform standards of performance throughout the engineering community.

The contributions of The Council to the public and to the engineering community by providing testing standards and the model law and other related services for licensed professional engineers could not be effectively discharged without the invaluable and necessary contributions of volunteers.

REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals for the Second Circuit in the case at hand, (Opinion No. 79-7254 and 79-7264) if allowed to stand, would irreparably damage The Council and its ability to serve the public as a whole. The Court of

Appeals for the Second Circuit affirmed a judgment against The American Society of Mechanical Engineers, Inc., hereinafter referred to as ASME, by finding that ASME had been an unintentional participant in an anticompetitive act directed against Hydrolevel Corporation by two "volunteer" members of ASME and their respective employers. Even though there was no showing that ASME had knowledge of the intent of the action of its volunteers, the Court nonetheless held ASME strictly liable for the misdeeds of the two volunteers because of their "apparent authority" to act in the area of code interpretation. Despite the fact that the intent of the actions of its volunteers were concealed from ASME, the Court nonetheless ruled that ASME must

assume the liability of the actions of the volunteer members based upon the Court's imposition of a standard of care which is unreasonable under the circumstances. The Court held that ASME was "strictly" liable for the actions of its volunteers despite its lack of knowledge, approval, or ratification.

From the perspective of The Council, the Court of Appeals has adopted an unprecedented and erroneous standard for vicarious liability under the anti-trust laws which, if allowed to stand, will place significant operational and financial burdens on The Council, and may in fact render The Council incapable of continuing to provide the service to the public that it presently renders.

If allowed to stand, the opinion

of the Second Circuit would have a chilling effect upon all volunteer efforts on behalf of The Council thereby depriving The Council of its tremendous source of workers and therefore, possibly forcing the Council out of existence. At present, volunteers of The Council provide contributions of their time and talent of their own free will and accord and with the consent, either expressed or implied, of the individual employers of the various volunteers. Further, many of the consultants provide their expertise and time for little remuneration and some of this country's best engineers provide their services for a nominal amount.

If allowed to stand, the opinion of the Second Circuit would effectively terminate all future voluntary

contributions now provided to members of The Council since volunteers and their employers would not subject themselves to the standard of liability imposed by the Second Circuit without substantial compensation. Further, and more important, if the decision is upheld, The Council would be put in the position of having to either be the insurer of the good faith of its members and volunteers or cease to exist due to its inability to be such an insurer. Cessation of existence is the more probable result.

If volunteers or their employees were no longer willing to assume responsibility, The Council would have to assume the exorbitant financial burden of hiring additional personnel to fulfill the services presently rendered by volunteers, provided such was

financially possible. The additional costs imposed upon The Council by being forced to pay for services performed would devastate The Council from an economic viewpoint and mean that The Council could no longer provide its objective uniform standard examinations to various state and jurisdictional boards without a substantial increase in the costs to those seeking licensure. As a result, the state and jurisdictional boards would have to develop their own examinations and thereby subject licensing examinations to local controls and local inconsistencies. In addition, given the additional financial burden of having to hire additional personnel to replace the voluntary efforts, it is entirely possible that this burden would be excessive and that The

Council would be forced to cease all operations due to the unfeasibility of paying full time personnel to replace the voluntary contributions now made by the individual licensed professional engineers.

If The Council could no longer effectively operate, this would be tremendously detrimental to public interest as a whole. The Council could no longer provide examinations for the licensing of professional engineers and the model law, as well as other services provided by The Council. As a result, the public could not be assured that standards of competence would be consistent throughout the engineering community. It is unreasonable to assume that the Federal Government or that state and local governments could absorb the functions

and services provided by The Council if, as a result of the Second Circuit's opinion, The Council could no longer effectively function.

The Council does not propose that its non-profit status or its voluntary organizational basis limits or restricts its immunity from anti-trust liability; however, The Council strongly asserts the position of ASME in stating that no professional society can exist if held strictly accountable for the unauthorized acts of individual voluntary members when, as a result of such actions, another party is injured. The standard imposed by the Second Circuit in the case at hand would serve, in effect, to severely limit the operations of The Council and its ability to deliver service to the public.

CONCLUSION

For the reasons outlined herein, The National Council of Engineering Examiners prays that the petition of The American Society of Mechanical Engineers, Inc. for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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